

2007 WL 4912957 (Mass.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of Massachusetts.
Essex County

Donald A. KELLER, Plaintiff,

v.

FBC PROPERTY MANAGEMENT CORPORATION, Harborlight House Properties, Robert Stoneham, Director,
Mary Miller, President, Neiland Douglas, Treasurer, Paul Lanzikos, President, First Baptist Church, Defendants.

No. 07-960.
2007.

**Memorandum of Law in Support of the Defendants' Motion to Dismiss the
Plaintiff's Complaint or, in the Alternative, for A more Definitive Statement**

The Defendants, FBC Property Management Corporation, Harborlight House Properties, Robert Stoneham, Mary Miller, Neiland Douglas, Paul Lanzikos, and First Baptist Church, By their Attorneys, [Jennifer Ellis Burke](#), B.B.O. # 554632, [Eric M. Chodkowski](#), B.B.O. # 648629, Taylor, Duane, Barton & Gilman, LLP, 160 Federal Street, 5th Floor, Boston, MA 02110, Tel: (617) 654-8200, Fax: (617) 482-5350.

The defendants, FBC Property Management Corporation, Harborlight House Properties, Robert Stoneham, Mary Miller, Neiland Douglas, Paul Lanzikos, and First Baptist Church (collectively "the Defendants"), submit this memorandum of law in support of their Motion to Dismiss the Plaintiff's Complaint. In the alternative, the Defendants request that this Court order the plaintiff to provide a more definite statement of the cause(s) of action alleged against the Defendants pursuant to [Rule 12\(c\) of the Massachusetts Rules of Civil Procedure](#) before an answer from the Defendants is required.

BACKGROUND

The plaintiff's two-page Complaint, a copy of which is attached hereto as Exhibit "A", contains a random collection of facts which purportedly support the plaintiff's "charges." The plaintiff asserts the following "charges": 1. **elder abuse** and neglect; 2. failure to perform fiduciary responsibility; 3. age discrimination; 4. religious discrimination; 5. violation of state discrimination laws; 6. falsification of lease and residency documents; 7. violation of state labor laws; and 8. slander and libel. *See* Exhibit "A", p. 1.

The plaintiff's Complaint only alleges the following:

- The plaintiff, Donald A. Keller, was an employee of the FBC Property Management Corporation between July 24, 2006 and March 20, 2007. *See id*;
- Mr. Keller was the Director of Harborlight House assisted living facility. *See id.*;
- Harborlight House houses 35 **elderly** residents with an average age of 85. *See id.*;
- Mr. Keller purportedly informed the defendant, Robert Stoneham, of the need to repair or replace a resident elevator, to replace a resident call system, and to replace a food management company. Mr. Keller also claims to have informed Mr. Stoneham that an emergency generator and roof repairs were needed. *See id.*;
- Mr. Stoneham allegedly informed Mr. Keller that money was available for these repairs. *See id.*;

- According to Mr. Keller, he informed Mr. Stoneham that the food service department could be run more cost efficiently and at a higher quality. *See id.*;
- Mr. Keller claims that he refused to alter documents to meet State requirements. *See id.*;
- Mr. Stoneham, who is younger and a member of the First Baptist Church, purportedly terminated Mr. Keller to assume his position at a higher salary. *See id.* at p. 2.;
- According to Mr. Keller, Mr. Stoneham made unsubstantiated claims about his character and professional abilities to Board Members and staff. *See id.*;
- Mr. Stoneham purportedly posted a notice that Mr. Keller should be arrested if he attempted to enter the building. *See id.*;
- The serving of old food allegedly resulted in a gastrointestinal outbreak among residents and staff. *See id.*;
- Mr. Keller claims to have an MBA, BSHSA, and over 28 years of experience in management, human resources, and healthcare administration. *See id.*;
- Mr. Keller alleges that he intended to keep his employment until retirement. *See id.*;
- According to Mr. Keller, he has taken out a criminal complaint against Mr. Stoneham and the issues remain unresolved. *See id.*;

The plaintiff seeks “immediate resolution of the dangerous conditions at Harborlight House and personal damages in the amount of \$4,000,000.” *See id.* The plaintiff’s Complaint provides no further detail about his claims and provides no guidance whatsoever as to the bases of his claims against the Defendants. Accordingly, the plaintiff’s Complaint should be dismissed in its entirety.

ARGUMENT

I. THE PLAINTIFF’S COMPLAINT SHOULD BE DISMISSED PURSUANT TO [RULE 12\(b\)\(6\) OF THE MASSACHUSETTS RULES OF CIVIL PROCEDURE](#) BECAUSE IT FAILS TO STATE A CLAIM AGAINST ANY OF THE DEFENDANTS.

In determining whether a complaint fails to state a claim upon which relief can be granted pursuant to [Rule 12\(b\)\(6\) of the Massachusetts Rules of Civil Procedure](#), the Court must accept as true all *well-pleaded* factual allegations in the plaintiff’s Complaint and must draw all *reasonable* inferences in favor of the plaintiff. [Fairney v. Savogran Co.](#), 422 Mass. 469, 470 (1996); [Eyal v. Helen Broad. Corp.](#), 411 Mass. 426, 429 (1991). Conversely, the Court need not and should not indulge the plaintiff’s “reliance on bald assertions, unsupportable conclusions, and opprobrious epithets.” [Chongris v. Bd. of Appeals](#), 811 F.2d 36, 37 (1st Cir. 1987); [Remco Distrib. Inc. v. Oreck Corp.](#), 814 F. Supp. 171,174 (D.Mass. 1992); [Kurker v. Hill](#), 44 Mass. App. Ct. 184, 193 (1998) (dismissing complaint that “*parrots* the requisite elements of the claim but *lacks factual support for [the] wholly conclusory allegations*”) (emphasis added). Likewise, pleadings which are too vague to state a claim are appropriate for dismissal under [Rule 12\(b\)\(6\) of the Massachusetts Rules of Civil Procedure](#). [Spence v. Boston Edison Co.](#), 390 Mass 604, 615 (1983).

In this case, the plaintiff’s Complaint is exceedingly vague as to the grounds for recovery from the Defendants. For example, it is unclear whether the plaintiff’s Complaint alleges that each of his eight “charges” applies to all of the Defendants or whether

certain “charges” apply to certain defendants. The Defendants should not be placed in the untenable position of having to ascertain which of the allegations contained in the plaintiff's Complaint are directed towards which defendant.

Moreover, the plaintiff asserts claims for **elder abuse** and neglect (Charge 1), failure to perform fiduciary responsibility (Charge 2), falsification of lease and residency documents (Charge 6), and violation of state labor laws (Charge 7). Reviewing the entire Complaint, it is unclear what allegations form the basis of these claims, no less whether the claims asserted by the plaintiff are recognized as causes of action under Massachusetts law. For example, the plaintiff asserts a claim for **elder abuse** and neglect, but offers no allegations in support of this claim or any citations to statutory provisions which were violated. The plaintiff also asserts a claim for failure to perform fiduciary responsibility, but does not allege which defendant owed a fiduciary responsibility and to whom that fiduciary responsibility was owed. In addition, the plaintiff asserts a claim for falsification of lease and residency documents, but fails to reference what lease and residency documents were falsified and which of the defendants falsified these documents. Finally, the plaintiff asserts a claim for violation of state labor laws, but offers no statutory citations as to which labor laws were violated.

Accordingly, the plaintiff's Complaint against the Defendants should be dismissed in its entirety under [Rule 12\(b\)\(6\)](#) of the Massachusetts Rules of Civil Procedure because it is too vague to state a claim.

II. THE PLAINTIFF'S CLAIMS FOR UNLAWFUL DISCRIMINATION SHOULD BE DISMISSED BECAUSE THE PLAINTIFF HAS FAILED TO EXHAUST ADMINISTRATIVE PROCEDURES REQUIRED BY [M.G.L. C. 151B, § 9](#).

[M.G.L. c. 151B, § 9](#) states, in relevant part, that:

Any person claiming to be aggrieved by a practice made unlawful under [M.G.L. c. 151B] ... may, at the expiration of ninety days after the filing of a complaint with the commission, or sooner if a commissioner assents in writing, but not later than three years after the alleged unlawful practice occurred, bring a civil action for damages or injunctive relief or both in the superior or probate court for the county in which the alleged unlawful practice occurred ...

“A plaintiff may not otherwise resort to the courts for a discrimination claim that is within the jurisdiction of the MCAD unless he has followed these procedures.” *Reidy v. Travelers Ins. Co.*, 928 F.Supp. 98, 106-107 (D.Mass.1996) citing *Charland v. Muzi Motors, Inc.*, 417 Mass. 580, 585 (1994).

In this case, the plaintiff asserts claims for age discrimination (Charge 3), religious discrimination (Charge 4), and violation of state discrimination laws (Charge 5 - presumably violations of M.G.L. c. 151B). *See* Exhibit “A”, p. 1. None of the defendants have received any notice from the Massachusetts Commission Against Discrimination (“MCAD”) that the plaintiff has filed a Charge of Discrimination against them. Likewise, nowhere within the plaintiff's Complaint does he allege that he has filed any Charge of Discrimination with the MCAD. Moreover, the plaintiff's Complaint does not allege that the Commissioner for the MCAD assented to the filing of this civil action. Because the plaintiff's claims for discrimination (Charges 3, 4, and 5), although vague, are well within the jurisdiction of the MCAD and because the plaintiff has not followed the procedures set forth under [M.G.L. c. 151B, § 9](#), the plaintiff's causes of action for age discrimination (Charge 3), religious discrimination (Charge 4), and violation of state discrimination laws (Charge 5) should be dismissed because the plaintiff failed to exhaust the administrative procedures required by [M.G.L. c. 151B, §9](#).

III. THE PLAINTIFF'S CLAIMS FOR SLANDER AND LIBEL SHOULD BE DISMISSED AS A MATTER OF LAW PURSUANT TO [RULE 12\(b\)\(6\) OF THE MASSACHUSETTS RULES OF CIVIL PROCEDURE](#).

“In order to establish a claim for libel or slander, [the plaintiff must demonstrate that [the Defendants] published a defamatory statement of or concerning [the plaintiff], that [the defendants were] negligent in ascertaining whether the statement was true,

false or defamatory before publishing it, and the statement or writing was capable of causing actual harm to [the plaintiff's reputation] in the community.” *MacKenzie v. AIDS Support Group of Cape Cod*, 2006 WL 2425063, *2 (Mass.Super.) citing *White v. Blue Cross & Blue Shield of Massachusetts, Inc.*, 442 Mass. 64, 66 (2004); see also *Draghetti v. Chmielewski*, 416 Mass. 808, 812, n. 4 (1994) (“Defamation encompasses the torts of libel and slander - the one being in general written while the other in general is oral”).

In this case, the plaintiff has not made the requisite showing to establish a claim for libel or slander. Except for one vague and conclusory reference in the plaintiff's Complaint that “Mr. Stoneham made unsubstantiated claims about the plaintiff's character and professional abilities to Board Members and staff”, the plaintiff failed to disclose any purported defamatory statement. Without examining what claims were made about the plaintiff's character and professional abilities, this Court cannot determine whether it amounts to defamation. See *MacKenzie*, 2006 WL 2425063 at *2 citing *Foley v. Lowell Sun Pub. Co.*, 404 Mass. 9, 11 (1989) (the threshold question as to whether a statement has a defamatory meaning is a question of law for the court). In addition, by failing to describe with any particularity what claims were made about the plaintiff's character and professional abilities, the plaintiff has not shown that the Defendants were negligent in ascertaining the truthfulness of those claims. Accordingly, the plaintiff has not established that any defendant made a defamatory statement, whether libelous or slanderous; and the plaintiff's libel and slander claim (Charge 8) must be dismissed pursuant to [Rule 12\(b\)\(6\) of the Massachusetts Rules of Civil Procedure](#) for failure to state a claim upon which relief may be granted.

IV. IN THE ALTERNATIVE, THE PLAINTIFF SHOULD BE ORDERED TO PROVIDE A MORE DEFINITE STATEMENT OF HIS CLAIMS AGAINST THE DEFENDANTS.

Because the plaintiff's Complaint is so vague and ambiguous, the Defendants cannot reasonably frame a meaningful responsive pleading. Such pleading deficiencies should not be condoned, and, accordingly, the plaintiff should be required to file a complaint which sets forth the specific grounds upon which he seeks recovery against the Defendants.

The Massachusetts Court of Appeals has encouraged the use of motions for more definite statements to “smoke out the nature of the plaintiff's grievance.” *Epstein v. Liberty Bank and Trust Co.*, 12 Mass. App. Ct. 1000 (1981). In *Epstein v. Liberty Bank and Trust Co.*, the Court held that the nature of the defendant's alleged wrongdoing was left to conjecture. Accordingly, a more definite statement was warranted. This is certainly true of the plaintiff's Complaint here, where the Defendants are left to speculate as to which of the plaintiff's allegations and eight “charges” they are being called upon to defend.¹

Similarly, in *Feeney v. City of Boston*, 13 Mass. App. Ct. 1004, 1005 (1982), the Court held that “[t]he unreasonably general and vague language used in this complaint to characterize the alleged negligence of the individual defendants is so broad as to permit a wide variety of attempts at supporting proof.” The Court went on to state that the “rules are not designed to encourage a plaintiff to put in a grievously murky complaint.” *Id.*

The Defendants are not asking that the plaintiff be ordered to describe his claim against them with the same detail required during discovery. [Rule 8\(a\) of the Massachusetts Rules of Civil Procedure](#) does not mandate that complaints state all relevant facts with completeness and precision. At the same time, however, a civil complaint must give “the defendant fair notice of what the plaintiff's claim is and the grounds on which it rests.” Smith and Zobel, *Rules Practice*, 6 [Massachusetts Practice Series](#), §8.2 (1974), citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The plaintiff here has failed to satisfy this obligation. Accordingly, if the Court is not inclined to dismiss this matter in its entirety, then the plaintiff should be ordered to file a complaint which sets forth the specific grounds upon which he seeks recovery against the Defendants.

CONCLUSION

For the above reasons, the defendants, FBC Property Management Corporation, Harborlight House Properties, Robert Stoneham, Mary Miller, Neiland Douglas, Paul Lanzikos, and First Baptist Church, move this Court for an Order dismissing the

plaintiff's Complaint in its entirety pursuant to [Rule 12\(b\)\(6\) of the Massachusetts Rules of Civil Procedure](#). In the alternative, the Defendants move this Court for an Order that the plaintiff's age, religion, and state discrimination claims (Charges 3, 4, and 5) be dismissed for failing to comply with [M.G.L. c. 151B, § 9](#), and that, pursuant to [Rule 12\(e\) of the Massachusetts Rules of Civil Procedure](#), the plaintiff be required to serve a more definite statement as to his remaining claims on the Defendants within ten (10) days of the allowance of this motion, that, at a minimum, shall include: (a) a description of the alleged acts and omissions of the Defendants that form the bases for the plaintiff's cause(s) of action; (b) the dates on which the alleged acts and omissions took place; and (c) a description of the alleged injuries and damages caused by each such act and omission.

The Defendants,

FBC Property Management Corporation,

Harborlight House Properties, Robert Stoneham,

Mary Miller, Neiland Douglas, Paul Lanzikos, and

First Baptist Church,

By their Attorneys,

<<signature>>

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Footnotes

- 1 The fact that the plaintiff in this case is proceeding *pro se* does not mean that he is immune from a motion for a more definite statement under [Rule 12\(e\) of the Massachusetts Rules of Civil Procedure](#). Indeed, in *Epstein, supra*, the Court recommended the filing of a [Rule 12\(e\)](#) motion as a means of “smok[ing] out the nature of the plaintiff's grievance” in a case where, as in this case, the plaintiff was not represented by counsel.